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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	**MM Docket No. 92-266**
	)	
Rate Regulation	)	

OPPOSITION TO PETITIONS FOR RECONSIDERATION

Cablevision Industries Corporation
Comcast Corporation
Cox Cable Communications,
a division of Cox Communications, Inc.
First Carolina Communications, Inc.
Jones Intercable, Inc.
Mid-Coast Cable Television, Inc.
Service Electric Cablevision, Inc.
Vista Communications, Inc.

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SUMMARY

The cable rate regulation rules adopted in the Order are already too stringent. The Commission should reject efforts to increase the burdens that the rules now impose on cable operators.

First, there is no justification for making the substantive rate regulation rules more restrictive. Doing so will only force more cable operators to make cost-of-service showings, increasing burdens on regulators and cable operators without any corresponding public benefit.

The proposals to increase regulatory burdens also have individual flaws. Recovery of external costs should not be further limited. The current pass-throughs correctly recognize that cable operators are unable to control many costs. Similarly, there is no reason to permit franchising authorities to initiate cost-of-service proceedings. There is a significant potential for abuse by franchising if they are permitted to initiate cost-of-service proceedings. Bell Atlantic's proposal for "regulatory parity" has no basis in fact or in law, because the characteristics of the cable and telephone industries and the legal frameworks under which they are regulated are significantly different. Finally, the Commission should not replace its current rules with a general cost-based scheme of regulation because there simply is not sufficient information to craft such a regulatory scheme and because doing so would be contrary to Congress' intent.

The Commission also should reject efforts to make the procedural provisions of rate regulation more onerous. Proposals to apply the uniform pricing requirement to non-regulated franchise areas, to redefine the term "franchise area" for determining whether there is effective competition and to prevent restructuring of

cable service offerings all are contrary to Congressional intent and to the language of the 1992 Cable Act. Had Congress intended the petitioners' interpretations, it would have written the statute differently. Similarly, the Commission should not link the initial dates of regulation for basic and cable programming services because the statute provides for separate mechanisms to trigger regulation for each tier.

Other proposals to increase the effective competition test's threshold also should be rejected. Efforts to exclude SMATV operations from effective competition calculations are contrary to Congressional intent and common sense. Moreover, the programming comparability test is reasonable, especially since competitive multi-channel programming distributors will succeed only if they devise packages that are attractive to consumers.

The Commission should resist efforts to rewrite the leased access provisions of the statute. Most notably, the "no adverse" effect" provision cannot be written out of the 1992 Cable Act. The Commission should not subdivide categories of programming for determining the highest implicit access fee because there is no evidence to support the distinctions that petitioners request. It also would be an error to micro-manage leased access offerings, as some petitioners propose. Finally, the Commission should not adopt more burdensome requirements for leased access complaints. The current rules will protect programmers' interests.

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OPPOSITION TO PETITION FOR RECONSIDERATION

Dow, Lohnes & Albertson, on behalf of the parties listed in Appendix A (the "Joint Parties"), hereby submit their opposition to various petitions for reconsideration filed in this proceeding.[1/] For the reasons described below, the petitions addressed in this opposition should be denied.

I. The Commission Must Reject Rate Regulation Proposals that Would Further Burden Cable Operators and Regulators.

One group of parties in this proceeding asks for reconsideration of the Order on the ground that the Commission's rate regulations do not go far enough. These parties argue that the Commission should make the existing rules even more restrictive, further limiting cable operators' opportunities to recover their legitimate costs. The current rules already are unreasonably restrictive. Furthermore, more stringent limitations on cable rates would greatly burden the cable industry and regulators alike, without any corresponding benefit to the public.

1/ Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Report and Order and Further Notice of Proposed Rulemaking, MM Dkt. No. 92-266, FCC 93-177, (released May 3, 1993) (the "Order").

As a practical matter, more rigorous rules would further complicate the new regulatory environment. Cable operators are concerned that because the benchmark regime is so severe, they may be required to engage in costly cost-of-service proceedings. A decrease in the benchmark levels would increase the number of cost-of-service proceedings levels and thus violate the statutory mandate "to reduce the administrative burdens" of regulation and frustrate the stated goal of the Commission that the benchmark regime provide the principal mechanism for regulation of cable

Commission should, consequently, reject any proposals that would increase reliance on cost-of-service proceedings, either directly or by narrowing the range of costs that can be recovered through benchmark/price cap regulation.

A. Limiting Recovery of External Costs.

Several parties want the Commission to narrow the range of external costs that are subject to the automatic pass-through.[4] However, limiting recovery of external costs is unlikely to have any positive effect.

First, automatic recovery of costs over which cable operators have no control lessens the burden of regulatory oversight. Many external costs subject to pass-throughs, such as costs of complying with franchise requirements, are costs that the statute requires the Commission to take into account in its rate regulations. The pass-through is the only mechanism that accounts for increases in those costs;[5] the benchmark system cannot account for unpredictable subsequent changes.[6]

4/ See Petition of NATOA at 40-43 (arguing that increased costs for affiliated programming may not be treated as external costs); Petition of King County et al. at 3-9 (arguing that most costs the Commission considers "external" are not beyond the operator's control). King County also suggests that the Commission should lower cable rates further because the benchmark rates do not account for non-subscriber revenues such as those from home shopping and advertising. Petition of King County et al. at 10-11. There is no evidence that non-subscriber revenues are any different for systems subject to effective competition than for systems that are not. Absent such evidence, adjustments to "account" for non-subscriber revenues are not warranted.

5/ The rules require a cable operator to balance any above-inflation exogenous costs with below-inflation costs. 47 C.F.R. § 76.922(d)(2).

6/ King County asserts that external costs already are accounted for in benchmarks. Petition of King County et al. at 7-9. It may be that the benchmarks indirectly account for these costs and their September 30, 1992 levels, even though the Commission's survey data do not specifically address external costs. That is irrelevant to future costs that operators will incur, however, because the September 30 benchmarks do not contemplate inclusion of any new or above inflationary costs incurred subsequent to that date. Pass-throughs are supposed to be akin to a

(continued...)

There also is no reason to further limit the types of costs that can be recovered through external cost pass-throughs. Cable operators have little or no control over increases in the prices charged for programming, especially popular programming.[7/] Franchise-related costs are particularly suited to be classified as pass-throughs, because the cable operator cannot make normal business decisions about whether to incur these costs.[8/]

Permitting rate adjustments to accommodate external cost increases is important to operators and necessary to the overall financial health of a cable operation. It is also important for cable subscribers to understand the source of such rate increases. Thus, to the extent that operators should incur external costs, they should be permitted to itemize on subscriber bills these costs in addition to franchise the clear language contained in Section 622(c) permitting such itemizations, is wrong and it should not be adopted by the Commission.[9]

B. Initiation of Cost-of-Service Proceedings.

King County argues that the Commission should let franchising authorities initiate cost-of-service proceedings. Petition of King County et al. at 1-3. This burdensome proposal should be rejected out-of-hand. The Commission's review of outliers will address King County's concerns.[10] Cost-of-service proceedings would greatly increase the administrative burdens of regulation for all parties. The Commission's mandate under Section 623(b)(2)(A) is to seek to reduce the

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9/ NATOA looks to the definition of franchise fee contained in the 1984 Cable Act as the basis for arguing that such itemizations are not permitted. Petition of NATOA at 11-13. NATOA's argument, however, runs counter to the legislative history of Section 622(c) (and Senator Lott's statement) explaining the purpose of this provision. S. Rep. No. 67, 98th Cong., 1st Sess. 25 (1983) ("[The cable operator] may designate the total franchise fee as a separate item on the subscribers' bills."); 138 Cong. Rec. S569 (daily ed. Jan. 29, 1992) (remarks of Senator Lott) ("I will have an amendment that will at least say the cable companies can identify on the bills those fees and taxes charged that drive up the rates . . . [The amendment] would give the cable companies an opportunity to itemize those so-called hidden costs, to explain to the people what is involved in the charges so they will know it is not just the cable company jacking up the prices."). The 1992 amendment, therefore, clearly indicates that Congress was in favor of informing subscribers about franchise-imposed costs in their cable bills.

10/ King County argues that cable operators will misallocate costs in cost-of-service showings. Id. at 3. This fear is unfounded; the Order requires cable operators in cost-of-service proceedings to allocate costs in the same way they were allocated before rate regulation was adopted. Order at ¶ 559. Similarly, NATOA's contention that an operator should not be permitted to elect to file a cost-of-service showing for basic and elect a benchmark for its programming service tier is equally unfounded. Petition of NATOA at 38-39. A cost-of-service showing, either at the franchising authority or Commission level, would reveal any effort to improperly allocate costs. Nothing would be gained by requiring an operator to elect cost-of-service rather than benchmark showing in this situation. It also would be inconsistent with Congress' desire to reduce the administrative burdens of regulation by forcing operators to file a cost-of-service showing where none should be required.

administrative burden on cable operators, subscribers and itself as well as on franchising authorities. 47 U.S.C. § 543(b)(2)(A).

The potential for abuses of ratemaking powers would also greatly increase if franchising authorities could initiate cost-of-service showings. The simple threat of a cost-of-service proceeding could force even an operator whose rates were at the Commission's benchmarks to reduce rates to avoid the delay and expense associated with such proceedings. Simply put, a franchising authority's ability to initiate a cost-of-service proceeding would greatly increase the potential for political abuses of ratemaking powers.

C. Regulatory "Parity".

Bell Atlantic asks the Commission to shift regulatory paradigms, focusing on "parity" with telephone companies rather than compliance with the 1992 Cable Act. Petition of Bell Atlantic at 6-7. Although Bell Atlantic would like regulatory parity, the 1992 Cable Act is not the vehicle to achieve its goals. There is no basis for Bell Atlantic's claim that telephone and cable companies should be regulated as identically as possible. As already established in this proceeding, the industries are significantly different, from the services they provide to the ways the investment community views them. See, e.g., Petition of Joint Parties at 25-28. Further, the statutory schemes governing cable and telephony are different. For instance, cable operators may not be regulated as common carriers, while telephone companies are subject to the entire panoply of Title II regulation.[11] Telephone companies also are not subject to many

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11/ See 47 U.S.C. § 541(c) (cable service not regulated as common carriage). King County argues that the Commission should apply common carrier rules to the treatment of cable's external costs. Petition of King County et al. at 8-9. This is inappropriate given the statutory distinction between cable and telephone regulation.

requirements that affect cable operators, such as the obligation to charge cost-based prices for equipment. See 47 U.S.C. § 543(b)(3). There is simply no evidence which would support parallel regulatory schemes given the positions of the two industries. In the end, Bell Atlantic's real quarrel is with the Commission's telephone regulations, which are not the subject of this proceeding.

D. Imposition of Cost-Based Regulation.

Finally, King County suggests that the Commission should shift the basic regulatory model from benchmarks to cost-of-service. Petition of King County et al. at 11-12. Even if, contrary to the plain dictates of the 1992 Cable Act, cost-of-service did not clearly discourage regulation, the Commission simply does not have the information necessary to craft a general system of cost-based regulation. Without years of experience in understanding the cost structure of the cable industry, efforts to apply cost-based regulation would result in widespread inequities.

More importantly, Congress did not intend that the Commission adopt general cost-based regulation. This is evidenced by both the legislative history and the language of the 1992 Cable Act itself.[12/] As discussed above, any proponent of cost-of-service regulation must bear an extraordinary burden to show why it should be adopted as the principal means for regulating cable rates. King County has not done so and, indeed, could not do so.

12/ See 47 U.S.C. § 543(b)(2)(A), (B) (favoring simplified forms of regulation and permitting the Commission to adopt a formulaic approach). The evolution of the rate regulation provisions also shows that Congress did not intend for the Commission to adopt cost-of-service regulation. See H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 58-62 (1992) (the "Conference Report") (describing changes in rate regulation provisions).

II. The Uniform Pricing Provision of the 1992 Cable Act Applies Only to Regulated Cable Systems.

King County argues that the uniform pricing provision should apply to all cable television systems regardless of whether a system is subject to effective competition. Petition of King County et al. at 16. King County cannot point to any statutory directive which requires or permits the Commission to assume jurisdiction where a system is subject to effective competition for the purpose of ensuring that rates are uniform throughout a system. Instead, King County argues that without Commission intervention, operators could subsidize low rates in one franchise area that faces competition by charging excessive rates in a franchise area where the operator does not face competition. Petition of King County et al. at 16. This argument is not persuasive. Operators will not be able to charge excessive rates in regulated markets because they are required to demonstrate that rates comply with the Commission's benchmark or cost-of-service standards. In fact, operators in regulated markets have no opportunity to subsidize reduced prices in competitive markets.

The Commission's conclusion that Congress intended the franchise area to constitute the "geographic area within which uniformity of rates is measured, and that for the purpose of Section 623(d) governing uniformity of rates, the term geographic area means franchise area" is well-founded. Order at ¶ 422. As the Commission recognizes, the statute contemplates that a local may exercise the power to prohibit discrimination. A delegation of regulatory responsibilities on a system-wide, rather than a franchise-wide basis, would be inconsistent with Section 623(d).

III. The Cable Act Preempts Franchise Provisions Which Prohibit Operators from Restructuring Service Offerings.

Franchising authorities may regulate cable television rates only under very specific circumstances.[13/] The statutory language is unambiguous: "Any franchising authority may regulate the rates for the provision of cable service . . . but only to the extent provided in [Section 623 and Section 612]. . . ." 47 U.S.C. § 543(a)(1) (emphasis added). Moreover, a franchising authority can only regulate cable systems to the extent its regulation conforms to the standards, guidelines and procedures established by the Commission. Franchise authorities cannot regulate rates pursuant to provisions of existing franchises that are not in accordance with the Commission's provisions. The 1992 Cable Act specifically grandfathers only a particular group of pre-July 1, 1990 franchises and permits them to be enforceable to term. Otherwise, provisions in existing franchises are preempted.[14/]

King County and NATOA request the Commission to reconsider its determination that the 1992 Cable Act preempts franchise provisions which limit the ability of operators to retier services. According to King County, franchise provisions that do not conflict with the limitations imposed by the 1992 Cable Act are not preempted. Petition of King County et al. at 22-25. Thus, King County asserts that franchise restrictions on retiering and rate regulation are enforceable as long as the minimum requirements of the 1992 Cable Act are met. 47 U.S.C. § 543(b)(7). This position is without support.

13/ 47 U.S.C. § 543(a)(2). The legislative history supports this strict mandate: "Rate regulation will be permitted only in the absence of effective competition." H.R. Rep. No. 268, 102d Cong., 2d Sess. 26 (1992) ("House Report") (emphasis added).

14/ 47 U.S.C. § 543(h). See also House Report at 80; S. Rep. No. 92, 102d Cong., 1st Sess. 74 (1992) ("Senate Report").

Congress passed the 1992 Cable Act to promote reasonable rates and to ensure that cable television subscribers could choose from a variety of services. In implementing this goal, the 1992 Cable Act requires an operator to include must-carry stations on the basic tier as well as public, educational and governmental access programming, and any signal of any television broadcast station (other than superstations) provided by the cable operator. 47 U.S.C § 543(b)(7)(A). Congress made clear, however, that the operator can make the choice to add additional programming to the basic service tier at its own discretion. 47 U.S.C. § 543(b)(7)(B). Congress intended that the basic tier contain "other video programming signals that the cable operator may choose to provide on the basic tier."[15/] According to the House Report, "[c]able operators will retain the authority to include any additional programming services on the basic tier," as long as rates are reasonable. House Report at 26 (emphasis added). Having mandated the minimum number of services that must be included on the basic tier, and having provided an operator with the flexibility to add additional services on the tier, Congress intended to provide an operator with the ability to determine the services which would comprise the basic service tier.[16/] By contrast, when describing the nature of the access programming that must be provided on the basic service tier, Congress took care to specify that all such programming "required by the franchise" was to be

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15/ Conference Report at 60 (emphasis added). The language is unconditional — operators have a choice as to whether they will carry programming other than the required minimum.

16/ Moreover, knowing that operators would have the ability to retier services, Congress also included a rate evasion provision in the statute "to prevent evasions, including evasions that result from retiering. . . ." 47 U.S.C. § 543(h).

included. With regard to this programming the operator was not given flexibility. The juxtaposition of these two provisions make clear Congress' intent.

Congress adopted provisions that permit the operator the latitude to structure programming tiers as well as provisions which limit its ability to do so in certain circumstances. Had Congress intended to permit provisions of existing franchises to service area to be consistent with Congress' competitive goals. Petition of NATOA at 15. NATOA claims this contention is supported by the definition of "service area" as the "area actually passed by a cable system" under the Commission's program access rules.[19] The adoption of a de facto service area test to measure effective competition would be inconsistent with the definition of effective competition contained in the 1992 Cable Act which looks to subscriber penetration of households in the "franchise area."

There is no indication that Congress intended the term "franchise area" to encompass only a portion of the "service area" that a system is authorized to serve. Congress otherwise would have specified with particularity that only those households to which service is available could be counted in determining the presence of effective competition. For example, Congress could have counted only the households to which service is offered by using language similar to that used in the second and third effective competition tests, which condition effective competition on whether a certain percentage of homes is served by more than one multichannel video programming distributor. The statute's language is explicit; it cannot rewrite the statute to be consistent with what the petitioners would have preferred or believe is more desirable.[20]

19/ Similarly, Michigan C-Tec believes that, for purposes of the 30% effective competition test, franchise area should be defined as the area where cable service is "technically and actually available," as is required under subsection 76.905(e). Petition of Michigan C-Tec at 3-6.

20/ MCI Telecommunications Corp. v. F.C.C., 765 F.2d 1186, 1191 (D.C. Cir.

B. SMATV Systems Are Technically and Actually Available Nationwide for Purposes of the 50 Percent Penetration Test.

SMATV systems are considered "technically and actually available" nationwide in all franchise areas that do not restrict the use of home satellite dishes.[21] NATOA argues that SMATV service is not available to subscribers nationwide and that the Commission assumes that there is a single SMATV service provider. Petition of NOTOA at 17-20. The Commission's Order correctly contemplates the existence of satellite delivered SMATV services that are potentially available nationwide by innumerable SMATV service providers. In fact, SMATV service is potentially available as a competitor to cable television systems and may be received by subscribers in every community in the country. Adopting NATOA's position would effectively eliminate SMATV services from the effective competition test. . Petition of NATOA at 17-20. Contrary to NATOA's assertion that the Commission assumes the existence of only one SMATV service provider, the Commission recognizes that SMATV service is potentially available nationwide by any number of SMATV service providers that may arrange to distribute satellite delivered program services. NATOA also states that the Commission is prohibited from assuming that SMATV services meet the 50% penetration test because the 50% test is applicable to programming distributors on an individual rather than on a

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20/ (...continued)
823 F.2d 1554, 1568 (D.C. Cir. 1987), cert. denied 485 U.S. 959 (1989) ("it is beyond cavil that the first step in any statutory analysis, and our primary interpretive tool, is the language of the statute itself").

21/ Order at ¶ 31. The Commission has determined that, although access to MMDS service requires the installation of an MMDS receiving antenna on subscriber premises, the service is, nonetheless, "technically" available. Id. at ¶ 30. The same holds true for SMATV services. Id. at ¶ 31.

cumulative basis. Petition of NATOA at 18-19. But the Commission's conclusion is not inconsistent with the statute. Given the nationwide accessibility of satellite programming to SMATV operators and the wide-spread accessibility of SMATV services to consumers, SMATV by definition is potentially available to at least 50% of the customers in the franchise area. Order at ¶ 31.[22/]

NATOA also argues that because landlords must order SMATV service if consumers in MDUs are to receive such services, the service is not "offered" to individual households in MDUs. Petition of NATOA at 19-20. The Commission already has assumed that SMATV/TVRO services are adequately marketed, and thus are actually available to all customers. The only remaining requirement is that the service be technically available to be "offered." The fact that a landlord rather than a tenant chooses SMATV service has no relevance as to whether the service is available.[23/] Nor can it be assumed that SMATV services are made available only to landlords. Homeowner associations, condominium owners and other groups of

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22/ The weakness of NATOA's position is evidenced by its contention that SMATV services could not service 50% of the households in franchise areas where more than 50% of the households are not MDUs because SMATV service typically contemplates service to an MDU. Petition of NATOA at 19. Taking this argument to its ultimate conclusion, SMATV service would virtually be eliminated as a competing video service provider where private households comprised more than 50% of an area. The Commission is not required to interpret the statute in such a manner as to reach a conclusion which is irrational or which fails to comport with logic or common sense. 2A Norman J. Singer, Sutherland Stat. Const. § 45.12 (5th Ed., 1992 Revision).

23/ The regulatory model NATOA suggests would condition the presence of effective competition on who is requesting service rather than whether the public is able to receive a competing multi-channel video service. This is like saying that service provided to rental apartments house could not qualify in determining whether the penetration threshold had been met while service provided to a condominium or cooperative, where customers owned their dwellings, could be considered. A provider of SMATV services is a competitor regardless of who has the right to sign the service agreement.

individuals also arrange for SMATV services. The Commission's comparability standard is a valid measurement of effective competition.

C. Program Comparability.

NATOA objects to the comparability test adopted by the Commission, and proposes instead that multichannel video programming distributors should be considered to offer comparable programming only if there is a 20-percent or less difference in the number of channels of non-broadcast programming offered by distributors. Petition of NATOA at 23. NATOA previously advocated this comparability standard in its comments, but the Commission rejected it along with others as too complicated. In effect, NATOA wants the Commission to substitute its definition of comparability in lieu of a better test - the marketplace - to determine whether subscribers have a comparable choice of programming. The Commission is not required to establish a standard of comparable video programming which approximates the number of services which a cable operator is providing. Indeed, there is no indication that a multichannel video provider need offer a near equivalent number of services in order to induce a subscriber to chose alternative service. It is reasonable to assume that a multichannel video distributor that provides at least twelve channels of programming and is able by itself or with others to meet the 15% threshold is providing effective competition under the statute.[24/] As a practical matter, moreover, a multichannel video distributor will choose to provide a complement of services which is an attractive alternative to those services provided by the operator.

24/ NATOA's example of a video service provider that offers eleven channels of broadcast programming and a single channel of home movies as a reason why the Commission should modify its comparability standard is simply unrealistic.

D. The Statute Provides Separate Dates for Determining the Initial Date of Regulation of Basic and Programming Service Tiers.

NATOA requests the Commission to set a common effective date for the regulation of basic and cable programming service tiers in lieu of separate dates for determining the initial date of regulation of each. Petition of NATOA at 36. The Joint Parties oppose NATOA's request. Unlike the regulation of basic service, Act") (and which was not changed by the 1992 Cable Act) that requires a cable operator to establish prices, terms and conditions for leased access use "which are at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system." 47 U.S.C. § 532(c)(1) (emphasis added). However, there is simply no indication in the 1992 Cable Act or its legislative history that Congress intended cable operators to act as common carriers with respect to what are, after all, commercial leased access channels. Those petitioners suggesting that cable operators be precluded from maximizing revenues simply want to compete in the same arena with operator-selected services without the investment made by such programmers.[25/]

For example, the Center for Media Education, et al. ("CME"), encourages the Commission to simply read the "no adverse affect" language out of the law.[26/] Despite CME's view, however, the Commission cannot "correct" Congress' decision not to repeal the "no adverse affect" language. Moreover, CME and other like-minded petitioners have failed to explain why the ability of a cable operator to maximize revenues is inconsistent with increased diversity and competition. Thus, their arguments must be rejected.

25/ See e.g, SUR Petition at 8 (the leased access provisions "are not a license for cable operators to maximize rates or even guarantee them profits") (emphasis added).

26/ CME bases this remarkable request on the fact that Section 612(a) of the 1984 Cable Act has been amended to read: "The purpose of this section is to promote competition in the delivery of diverse sources of video programming." Petition of CME at 9. In CME's view, these provisions are inconsistent and, therefore, the later adopted language must nullify the existing provision of the Communications Act.

B. The Commission Should Not Create More Programmer Categories for the Highest Implicit Fee Calculations.

The Commission's determination that cable programmers must be divided into three distinct categories for purposes of calculating the highest implicit fee has, predictably, drawn responses from various programmers who would like the Commission to carve out "just one more" category for their type of programming.[27] If there must be classifications, however, the only legitimate programmer categories shall distinguish between per channel/per event programming and all other programming. See Petition of Joint Parties at 46. There is no compelling reason, let alone a legal basis, for the Commission to further fragment programming categories in order to accommodate more and more narrowly-focused program suppliers. Further, there is no rationale or legal basis for the Commission to dictate lower rates for specialized classes of programmers, whether non-profit, minority, educational or otherwise.[28] Congress modified the leased access provisions "to promote

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27/ See Petition of CME at 11 (non-profit channel lessees); Petition of SUR at 11 (per event or per channel programmers serving minority or educational needs); and Petition of Paradise Television Network ("PTN") at 9 (advertiser supported services).

28/ Not surprisingly, the outcome of each request to create a new category of programming is to lower the rates that cable operators may charge such programmer. See e.g., Petition of CME at 13 ("Lower rates for non-profits are necessary to ensure that . . . diversity is achieved."); Petition of SUR at 11 ("Thus, per event or per channel pay programmers serving minority or educational needs . . . should receive a competition in the delivery of diverse sources of video programming," not to force cable operators to subsidize underfunded programmers.[29]

Congress also specifically granted cable operators the right to allocate up to a third of leased access channel capacity to qualified educational and minority programmers. 47 U.S.C. § 532(i). Thus, Congress made even the content-specific channel "set-asides" contemplated by the 1992 Cable Act discretionary and, therefore, contingent on an operator's determination as to the best use of its commercial leased access capacity. In contrast, CME's recommendation for a mandatory channel set-aside for non-profit programmers is not only confiscatory, it is inconsistent with the framework of the legislation. Petition of CME at 13.

C. The Commission Should Not Involve Itself in the Day-to-Day Management of Commercial Leased Access Channels.

A number of petitioners in addition to requesting narrower programmer categories and favorable rate treatment in this proceeding have asked the Commission to become involved in the day-to-day administration of commercial leased access channels. For example, several petitioners have asked the Commission to grant them

29/ Further, petitioners themselves disagree over the effect of the Commission's formula for determining maximum reasonable rates. For example, several petitioners maintain that home shopping category rates will (or should be) determined by the "explicit" fee paid by the programmer to the cable operator (typically, 5% of sales). However, CME believes that home shopping category rates will be "far lower" than rates for other programming categories, leading to the displacement of other programmers by home shopping services. Petition of CME at 8. ValueVision, on the other hand, believes that use of an "explicit" fee calculation will not result in any migration of home shopping services to leased access channels. Petition of ValueVision at 5. As the Commission has sagely observed, now may not be the appropriate time "to comprehensively resolve all the issues potentially involved, many of which can better be resolved in a more specific concrete factual setting." Order at ¶ 491.

priority access to a channel.[30] Other petitioners, under the banner of seeking "reasonable terms and conditions of use," have asked the Commission to mandate detailed operating plans under which cable operators would administer their commercial leased access channels, by specifying tier placement, time-of-day offerings and what constitutes a "reasonable" security deposit. Petition of CME at 13-16.

There, petitioners have clearly confirmed the subjective nature of the term "reasonable". This is demonstrated most clearly by the CME Petition, which recommends a maximum lease period of <u>fifteen years</u> for an access channel. Petition of CME at 15 n.11. Beyond the issue of "unreasonable" demands, however, there is